STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Holbrook, Jr., P.J.; Saad, JJ., Talbot, JJ.

DANIEL ADAIR, a Taxpayer of the FITZGERALD PUBLIC SCHOOLS; and FITZGERALD PUBLIC SCHOOLS, a Michigan municipal corporation, et al,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN, DEPARTMENT OF EDUCATION; DEPARTMENT OF MANAGEMENT AND BUDGET; and MARK A. MURRAY, TREASURER OF THE STATE OF MICHIGAN,

Defendants-Appellees.

Supreme Court No.:121536
Court of Appeals Case No.: 230858

BRIEF ON APPEAL – APPELLANTS

ORAL ARGUMENT REQUESTED

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BASIS OF JURISDICTION

The Michigan Court of Appeals had original jurisdiction over the present suit pursuant to Const 1963, art 9, § 32. This Court has jurisdiction to review on appeal the final decision of the Court of Appeals dismissing the suit, with prejudice, rendered April 23, 2002, by operation of MCR 7.301(2), this Court having granted leave to appeal on December 18, 2002.

STATEMENT OF QUESTIONS INVOLVED

1. Whether *res judicata* bars the claims of those plaintiffs who also were plaintiffs in *Durant v State of Michigan*, 456 Mich 175 (1997).

   The trial court answered the question yes.

   The appellant answers the question no.

2. Whether the claims of those plaintiffs who were not parties to *Durant I* are barred because the current plaintiff school districts released or waived their current claims by adopting resolutions that conformed to MCL 388.1611f(8); and

   The trial court answered the question yes.

   The appellant answers the question no.

3. Whether the Court of Appeals erred by granting summary disposition for the defendants on the recordkeeping claim that the Court determined was not barred by either *res judicata* or release.

   The trial court answered the question no.

   The appellant answers the question yes.

STATEMENT OF FACTS AND PROCEEDINGS

On November 15, 2000, plaintiffs-appellants (hereinafter "plaintiff-taxpayers") commenced the proceedings below by filing suit in the Court of Appeals pursuant to § 32 of the Headlee Amendment. That section of the Amendment provides in pertinent part as follows:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article . . . . Const 1963, art 9, § 32.

As pled, the plaintiff-taxpayers are taxpayers of the state and, more proximately, taxpayers of 463 local and intermediate school districts located throughout Michigan. The school districts for whose benefit this suit has been brought are also joined as parties plaintiff.

In their second amended complaint[1] (112a-197a), plaintiff-taxpayers alleged that 2000 PA 297, the 2000 amendment to the School Aid Act,[2] was violative of the *second* sentence of Const 1963, art 9, § 29, part of the Headlee Amendment to the Michigan Constitution adopted in November of 1978. This sentence states:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government,[3] unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. . . . Const 1963, art 9, § 29.

More particularly, plaintiff-taxpayers alleged in their second amended complaint that there are numerous, identified activities and services required by the legislative and executive branches of state government to be provided by local and intermediate school districts that are beyond those

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[1] Plaintiff-taxpayers filed a first amended complaint on January 3, 2001 and a second amended complaint on April 16, 2001.

[2] The School Aid Act, MCL 388.1611 *et seq.* was enacted in 1979. Amendments to the Act have been adopted annually by the Legislature to appropriate funding for each successive school year.

[3] As defined in § 33 of the Amendment, school districts are "units of Local Government", Const 1963, art 9, § 33.

required by laws existing as of the time the Headlee Amendment was adopted and which are not being funded by the state. The complaint specifically alleged that these activities and services are not being funded by operation of 2000 PA 297, as required by § 29 of the Headlee Amendment. The various unfunded requirements alleged to violate Const 1963, art 9, § 29 were explicitly set forth in the second amended complaint.[4] Directly consonant with this Court's holding in *Durant v Mich*, 456 Mich 175, 205-206; 566 NW2d 272, 285 (1997), the plaintiff-taxpayers sought, by way of remedy, the issuance of a declaratory judgment concerning the constitutionality of 2000 PA 297, insofar as the requirements imposed on school districts by the executive and legislative branches of state government were not being funded through that Act consistent with the above-quoted sentence of § 29 of the Headlee Amendment.

On May 18, 2001, the state filed a motion for summary disposition in the proceedings below. Following an exchange of briefs, and following oral argument, the Court of Appeals rendered a decision on April 23, 2002 in which it granted summary disposition in favor of the state pursuant to MCR 2.116(C)(7) and (10). *Adair v State of Michigan,* 250 Mich App 691; 651 NW2d 393 (2002). The court dismissed plaintiff-taxpayers' complaint, with prejudice.

By way of summary, the Court of Appeals held that those plaintiff school districts that were also plaintiffs in the so-called "*Durant I*" proceedings were barred by application of the doctrine of *res judicata* from bringing the present suit challenging the constitutionality of 2000 PA 297. In terms of those plaintiffs who were not plaintiffs in the *Durant I* proceedings, the Court of Appeals

[4] These include such mandated activities and services as newly added special education services (Count I of the second amended complaint), increases in hours and days of pupil instruction and other discrete obligations imposed through changes to the School Code subsequent to 1978, currently referred to as the Revised School Code, (Count II of the second amended complaint) and through other changes to the School Code subsequent to 1978, as well as an Executive Order (Count III of the second amended complaint). The most recent requirement imposed in the latter category occurred as a result of Executive Order 2000-9, imposing extensive student, employment and physical plant/facilities data collection, maintenance and reporting for which only minimal funding is presently provided to Michigan school districts. (107a-111a).

held that they were barred by application of the principles of waiver or release from bringing the present action. Finally, with respect to plaintiff-taxpayers' claims concerning the additional data collection, management and reporting requirements associated with requirements imposed pursuant to Executive Order 2000-9, the Court of Appeals held that these are not, in fact, new requirements within the meaning of the second sentence of § 29, but, rather, are continuations of requirements in place in 1978 and thus are not actionable under the second sentence of § 29 of the Amendment. The court further held that these activities and services are not, in any event, cognizable under § 29, holding that they are imposed by operation of Const 1963, art 8, §§ 1 and 2.

On May 14, 2002, plaintiff-taxpayers filed an application for leave to appeal from the above decision of the Court of Appeals. In an order dated December 18, 2002, this Court granted the application, instructing the parties to address the following issues:

1. Whether *res judicata* bars the claims of those plaintiffs who also were plaintiffs in *Durant v State of Michigan*, 456 Mich 175 (1997).

2. Whether the claims of those plaintiffs who were not parties to *Durant I* are barred because the current plaintiff school districts released or waived their current claims by adopting resolutions that conformed to MCL 388.1611f(8); and

3. Whether the Court of Appeals erred by granting summary disposition for the defendants on the recordkeeping claim that the Court determined was not barred by either *res judicata* or release.

Plaintiff-taxpayers offer this brief addressing these issues.

ARGUMENT

I. PLAINTIFF-TAXPAYERS IN THIS MATTER WHO WERE ALSO PLAINTIFFS IN THE EARLIER *DURANT I* PROCEEDINGS ARE NOT BARRED BY RES JUDICATA FROM BRINGING THIS ACTION FOR DECLARATORY RELIEF.

In its May 18, 2001 motion below, the state asserted that those plaintiffs in the current proceedings who were also plaintiffs in the earlier *Durant I* proceedings were barred from bringing the present suit by operation of *res judicata*. The Court of Appeals granted the state's motion, partly on that basis.

A. The Application Of *Res Judicata* Requires That The Facts/Evidence Germane To Decision In A Prior Legal Proceeding Are Identical To The Facts/Evidence In The Case Where That Defense Is Asserted. The Facts/Evidence Necessary To Decide A Claim Under The First Sentence Of § 29 Of The Headlee Amendment Are Essentially Different Than The Facts/Evidence Necessary To Decide A Claim Under The Second Sentence Of § 29 Of The Headlee Amendment. For That Reason *Res Judicata* Does Not Apply In This Case.

The state argued in its motion that the claims asserted in the second amended complaint either "were or could have been" asserted by the plaintiffs in the consolidated *Durant I* cases and were, therefore, barred by *res judicata*. In its April 23, 2002 decision on appeal, the Court of Appeals accepted this argument, stating:

> The gravamen of all the claims raised in *Durant I*, and alleged in the instant action, is a violation of art 9, §29. In other words, *although the claims raised in* Durant I *arise from different government actions and omissions and under a different clause of art 9, §29, the gravamen of each suit is the violation of but one primary right of plaintiffs, namely, the right to be adequately funded by state appropriations as required by the constitution of this state.* The number and variety of facts proved in *Durant I* and alleged in the instant action, as well as differing and multiple theories advanced in *Durant I* as compared to the instant action, are of no import for purposes of an application of *res judicata* where, whether they are considered severally or in combination,

> their result is the violation of the same single right. *Baltimore S S Co., supra* at 321. Accordingly, because *Durant I* and the instant action address the violation of the same legal right and because the claims advanced in the instant action accrued during the *Durant I* litigation, we conclude that these claims arise from the same transaction for purposes of *res judicata*. (emphasis added) 250 Mich App at 705-06

It is submitted that the Court of Appeals improperly melded the separate and distinct causes of action under the first and second sentences of Const 1963, art 9, § 29. This, in turn, resulted in the Court of Appeals' erroneous conclusion that the separate violations "arise from the same transaction for purposes of *res judicata*."

The determination of whether *res judicata* bars a subsequent action is a question of law which this Court reviews *de novo*. *Pierson Sand and Gravel, Inc v Keller Brass Company*, 460 Mich 372; 596 NW2d 153 (1999). In *Baraga County v State Tax Commission*, 466 Mich 264, 269; 645 NW2d 13 (2002), this Court set forth the necessary elements for *res judicata* to apply:

> There are three prerequisites to the application of the doctrine of *res judicata*: "a prior decision on the merits; the issues must have been resolved in the first case ...; and both actions must be between the same parties or their privies." [authority cited] Further, the burden of proving the applicability of the doctrine of *res judicata* is on the party asserting it.

Directly pertinent to the present case, this Court has also held:

> *Res judicata* bars a subsequent action between the same parties when the evidence or essential facts *are identical*. (emphasis added). *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

The principle that *res judicata* applies only where the same facts or evidence are essential to the maintenance of the two actions has frequently been relied upon in holdings issued by the Court of Appeals. *Eaton Co. Bd. of Rd. Comm'rs v Schultz*, 205 Mich App 371, 375, 521 NW2d 847 (1994); *Jones v State Farm Mutual Auto. Ins. Co.*, 202 Mich App 393, 401, 509 NW2d 829 (1993); *Mazzola v Vineyard Homes, Inc.*, 54 Mich App 608, 613-14, 221 NW2d 406 (1974). For

example, in *Mazzola* the Court of Appeals quoted with authority from the American Jurisprudence legal encyclopedia, as follows:

> In the application of the doctrine of *res judicata*, if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. *If, however; the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other.* 30A Am Jur, Judgments, §365, pp.407-08. (emphasis added) *Mazzola, Id.*, at 613-14

It is submitted that the first and second sentences of § 29 impose materially different funding obligations on the state and, accordingly, implicate materially different proofs as to the existence of a constitutional violation in order to be sustainable. They are not, as the Court of Appeals held, simply subsets of a single, generalized claim of constitutional underfunding.

The facts required to establish a claim under the first sentence of § 29 of the Headlee Amendment, the subject of the 1997 ruling of this Court in *Durant I, supra*, are mutually exclusive from the facts or evidence required to prove a violation of the second sentence of § 29 of the Headlee Amendment, the issue in the instant case. The first sentence of § 29 concerns activities and services that were mandated by state law as of December, 1978, the effective date of the Headlee Amendment, and implicates a continuing proportion of state funding (i.e., state supplied revenue provided to local units of government as a percentage of the cost incurred by those units of local government in order to provide the required activity or service) applicable at the time of the adoption of the Amendment. In contrast, the second sentence concerns activities and services that were mandated *after* December of 1978 or represent an increase *after* December of 1978 in the level of an activity or service required in December of 1978, and implicates full or 100% funding for the

necessary costs incurred by the local unit of government in order to provide the required activity or service.

The difference in the proofs required to establish claims under the first and second sentences of § 29 relates to the fundamentally different purpose sought to be achieved between the two sentences. Indeed, this Court explicitly recognized those disparate purposes in *Judicial Attorneys Association v State of Michigan,* 460 Mich 590, 597-98; 597 NW2d 113 (1999). The Court stated:

> [Section] 29 distinguishes between the continuation of an activity mandated in 1978 and the imposition of a new activity or increase in the level of an activity. Section 29 prohibits the state from reducing its proportion of the necessary costs of *existing activities* while it requires the state to pay the increased necessary costs in full when it mandates *new activities* or mandates activities at an *increased level.* (emphasis in original).

In *Wayne County Chief Executive v Governor,* 230 Mich App 258, 264-65; 583 NW2d 512 (1998) the Court of Appeals had, itself, recognized this distinction, stating:

> The scope of the section (Article 9, § 29) reveals that it was specifically intended to encompass *two different injuries.* As the great mass of people surely understood from the language of the section, claims brought pursuant to § 29 arise from situations *involving one of two harms:* either the withdrawal of state financial support where such support of state-mandated local activities was already being provided or the introduction of new local obligations without accompanying the offsetting state appropriations. (emphasis added).

In stark contrast, the Court of Appeals in the instant case concluded that:

> The gravamen of each suit is the violation of but one primary right of plaintiffs, namely, the right to be adequately funded by state appropriations as required by the constitution of this state. *Adair, supra,* 250 Mich App at 705-706.

As discussed above, both this Court and the Court of Appeals have squarely held that there are fundamental differences between the first and second sentences of § 29 of the Headlee

Amendment. In order to establish a claim under the *first sentence* of § 29, a taxpayer must show in a suit brought pursuant to § 32 of the Headlee Amendment that:

1. There is a continuing state mandate imposed on local units of government (*i.e.*, continuing from prior to the time when the Headlee Amendment was adopted through the present);

2. The State funded the mandated activity or service at a certain proportion of necessary costs being incurred by local units of government when the Headlee Amendment was adopted; and

3. The State funding of the necessary costs of the mandated activity or service has dropped below the proportion provided when the Headlee Amendment was adopted.

Oakland County v State of Michigan, 456 Mich 144, 151; 566 NW2d 616 (1997).

In a suit brought under the *second sentence* of § 29, on the other hand, it is submitted that the taxpayer's burden is to prove the following elements:

1. The particular activity or service at issue was not mandated by state law when the Headlee Amendment was adopted, or, if it was mandated at that time, it was not mandated at the level of activity or service currently required.

2. Subsequent to the adoption of the Headlee Amendment, the State newly mandated the activity or service or mandated an increase in the level of the activity or service above that required in December of 1978.

3. The State is not providing full funding to local units of government for the necessary costs incurred in connection with providing the newly mandated activity or service or the increased level of the activity or service.

Again, there are fundamental differences between the two causes of action and, commensurately, the required proofs for alleged violations of the first and second sentences of the Headlee Amendment are materially different. Thus, the doctrine of *res judicata* does not apply.

It is accordingly submitted that the Court of Appeals erred in finding that the two causes of action are but violations of one primary right.

B. *Res Judicata* Does Not Apply In A Circumstance Where The Subject Of A Suit, Alleging Unconstitutionality Of A Statute, Concerns A Statute Adopted After The Conclusion Of A The Prior Suit Upon Which The Defense Of *Res Judicata* In The Subsequent Suit Rests.

Wholly apart from the foregoing argument, the Court of Appeal's interpretation of the doctrine of *res judicata* would create a tremendous anomaly that would be totally antithetical to the Michigan electorate's manifest intent, expressed through § 32 of the Headlee Amendment, to allow taxpayers to seek "to enforce", *inter alia*, § 29 of the Headlee Amendment by bringing suit in the Court of Appeals. The subject of this suit is a 2000 amendment to the School Aid Act, 2000 PA 297, an enactment which postdates by almost three years the conclusion of the *Durant I* proceedings, which occurred on July 31, 1997. *Durant, supra.* Specifically, the plaintiff-taxpayers assert in their complaint that state government is not meeting its constitutional funding obligation to the named plaintiff school districts under the second sentence of § 29 of the Headlee Amendment *by operation of the 2000 amendment to the Act*, 2000 PA 297. Accordingly, the lower court has ruled that, by operation of the doctrine of *res judicata*, the taxpayers of the school districts involved in the *Durant I* proceeding are forever barred from challenging state government's compliance with the requirements of § 29 of the Headlee Amendment through later funding legislation as it relates to their school districts.

It is as though the doctrine of *res judicata* imposes on the parties an obligation of clairvoyance. Not only is the affected plaintiff charged, at the risk of the application of *res judicata*, with the presumed awareness of all possible arguments or assertions relating to establishing the unconstitutionality of legislative enactments then existent, but this decision of the court would require those litigants to somehow be knowledgeable of the deficiencies of enactments that might later come into existence, such as occurred in this case.

This is, most certainly, not the law of Michigan. As this Court noted in *Baraga County, supra,* 466 Mich at 269, in order for the doctrine of *res judicata* to be applicable "the issues must have been resolved in the first case." Since 2000 PA 297 had not even been enacted when the *Durant I* case was resolved, this Court's ruling in *Durant I* on July 31, 1997, and the preceding Court of Appeals' decisions in that case, obviously did not serve to resolve the constitutionality of that amendment to the Act.

A case decided by this Court that is even more directly on point is *Socialist Workers Party v Secretary of State*, 412 Mich 571, 317 NW2d 1 (1982). In that case, the plaintiffs challenged the constitutionality of an amendment to Michigan's election law adopted in 1976, 1976 PA 94. The suit was filed in Wayne County Circuit Court in 1980. The facts of the case were that prior to filing the suit, one of the plaintiffs, Socialist Workers Party, had filed suit in 1976 in the United States District Court challenging the constitutionality of the same act, under the First and Fourteenth Amendments to the United States Constitution. The outcome of the case was a holding, affirmed by the United States Supreme Court, that the amendment to the act did not violate the Federal Constitution. *Hudler v Austin,* 419 F Supp 1002 (ED Mich 1976) *aff'd sub nom, Allen v Austin,* 430 US 924, 97 S Ct 1541, 51 L Ed 2d 769 (1977).

The case before this Court, filed in 1980 by one of the same plaintiffs, Socialist Workers Party, sought declaratory judgment that 1976 PA 94 violated both the First and Fourteenth Amendments to the Federal Constitution, the very same assertion raised in the prior suit in federal court, and Article 1, §§ 1, 2, 3 and 5 and Article 2, § 4 of the Michigan Constitution. The Secretary of State asserted the defense of *res judicata* based on the resolution reached in the prior federal proceedings. The circuit court dismissed the suit based on that defense. This Court granted leave to appeal prior to decision by the Court of Appeals.

The Court began its analysis by recognizing:

> The plea of *res judicata* applies to points previously litigated and decided as well as to points " 'which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time' " *supra* at 583-4.

However, the Court noted as follows:

> There are exceptions to the doctrine, such as found in Restatement Judgments, 2d (Tentative Draft No. 1, 1973), § 68.1, pp. 170-171:
>
> "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances.
>
> * * *
>
> "(b) The issue is one of law and . . .
>
> * * *
>
> "(ii) A new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws . . . ."
>
> The purpose of this section is explained by the commentary:
>
> "A rule of law declared in an action between two parties should not be binding on them for all time, especially as to claims arising after the first proceeding has been concluded, when other litigants are free to urge that the rule should be rejected. Such preclusion might unduly delay needed changes in the law and might deprive a litigant of a right that the court was prepared to recognize for other litigants in the same position." *supra* at 584.

The Court held in that case that the above exception applied because the issue before the Court was one of law and because of intervening circumstances relating to changes in the methods of voting in Michigan since the time of the prior suit.

The present case presents an even more compelling circumstance for application of the exception relied upon by this Court in the *Socialist Workers Party* case. The declaratory judgment being sought manifestly implicates a question of law, i.e., the constitutionality of a Michigan statute. Additionally, the intervening statute, 2000 PA 297, which put in place a newly devised school funding scheme, is, quite clearly, a new or intervening circumstance between the conclusion in 1997

of the *Durant I* case and the time when the present suit was filed in November of 2000. This contrasts to the circumstances in the *Socialist Workers Party* case where the subject of the subsequent suit was the *same* statute as that earlier adjudicated in federal court, applying, in part, the same Federal Constitutional provisions. The intervening circumstances wrought in this case by the changes in the statute under scrutiny, adopted after the preceding litigation, would be even more significant than changes in customs and practices of voting, absent a change in the statute under scrutiny.

Thus, even if it is assumed, *arguendo*, that there is an identity of operative facts adjudicated by the Court in the *Durant I* case and those raised in the present case, there should be no question that the adoption of subsequent funding legislation represents "an intervening change in the applicable legal context . . . ." *Socialist Workers Party, supra,* 412 Mich at 584. Accordingly, the decision on appeal is substantially in error and merits reversal.

C. ***Res Judicata* Does Not Apply In The Circumstances Of This Case Where The Plaintiffs Pled Late In The Proceedings In The Prior Case, *Durant I*, A Separate And Discrete Count Asserting A Claim Under The Second Sentence Of § 29 Of The Headlee Amendment But Where That Claim Was Not Considered Or Decided By Either The Court Of Appeals Or This Court At Any Point In Those Prior Proceedings Due To The Lateness Of The Claim Being Pled.**

In its April 23, 2002 decision, the Court of Appeals also stated:

> Having concluded that these claims arise from the same transaction as those advanced in the *Durant I* litigation, we further conclude that, through an exercise of reasonable diligence, plaintiffs could have raised their instant claims in the prior litigation, as evidenced by the fact that several of the plaintiffs in the *Durant I* litigation did allege violations of the POUM clause. Under these circumstances, we hold that *res judicata* bars these plaintiffs from pursuing all but the record-keeping claim. 250 Mich App at 706

Several observations are necessary with regard to this aspect of the court's decision below. As reflected in the introductory phrase quoted immediately above, the Court of Appeals' ruling on this point is dependent on a finding that the claims under the second sentence of § 29 "arise from the same transaction as those advanced in the *Durant I* litigation." As argued above, this is most certainly not the case. It is the commonality of the facts to support the respective claims, not whether the matters could have been joined in a single proceeding, which is determinative for *res judicata* purposes. *Dart v Dart, supra.*

In its decision below, the Court of Appeals correctly noted that some of the plaintiff-taxpayers' claims concerning the second sentence of § 29 were, in fact, asserted (but not briefed nor ruled upon) in the *Durant I* proceedings. It is necessary, therefore, to address what was decided in the *Durant I* proceedings.

Following the issuance of this Court's decision in *Schmidt v. State of Michigan,* 441 Mich 236; 490 NW2d 584 (1992), this Court remanded both the *Schmidt* and *Durant* cases to the Court of Appeals. These cases were then consolidated by the Court of Appeals with thirty-three other cases raising similar issues which had been ordered held in abeyance pending this Court's decision in *Schmidt* (2a-3a).

On June 29, 1994, the Court of Appeals ordered the appointment of a special master to take evidence and render a report to the court. Retired Wayne County Circuit Court Judge James E. Mies was appointed to serve as the special master (4a-5a). While the case was pending before Judge Mies, plaintiff-taxpayers sought, and were granted, permission to file an amended complaint in order to assert claims for the 1993-94 school year, in addition to the pending claims which then alleged the lack of constitutionally required funding for the 1979-80 through 1992-93 school years (20a-21a).

In the amended complaints filed on June 29, 1994 in the thirty-three cases other than the *Schmidt* and *Durant* cases, the plaintiff-taxpayers, in addition to preserving their claims of violations of the first sentence of § 29 of the Headlee Amendment through the 1993-94 school year, included a separate count alleging violations of the second sentence of § 29 of the Headlee Amendment (a representative complaint is found at 6a-19a). The allegations in this regard encompassed *some of* the specific mandates that are referenced in the second amended complaint filed in the present proceeding (*i.e.,* some of the special education claims only).

At the time of the evidentiary proceedings before Judge Mies, the audited financial statements required to determine the amount of the state-wide funding provided to local schools and the underfunding for each plaintiff school district were available only through the 1992-93 school year. As in the normal course, the audited financial information for the 1993-94 school year was not expected to be available from the Michigan Department of Education until the spring of 1995. The parties accordingly stipulated in the proceedings before Judge Mies that any judgments entered in favor of plaintiff-taxpayers would be later amended to include any underfunding for the 1993-94 school year (22a-25a). Thus, the factual proofs that were introduced as to a violation of the first sentence of § 29 necessarily ended with the 1992-93 school year. No proofs whatsoever were taken, and no arguments were even offered, to either the Court of Appeals or this Court during subsequent proceedings, with respect to the alleged violations of the second sentence of art 9, § 29.

Judge Mies' report, which was filed with the Court of Appeals in June of 1995, dealt exclusively with the state's violations under the first sentence of art 9, § 29, and adjudicated the plaintiffs' claims through *only* the 1992-93 school year. None of the claims concerning the second sentence of art 9, § 29 were ever heard, considered, or decided by Judge Mies. Judge Mies' report

in the *Durant I* proceedings manifestly did not represent, even impliedly, an adjudication of the plaintiffs' claims under the second sentence of Article 9, § 29 (26a-35a).

When the audited financial statements for the 1993-94 school year subsequently became available in the spring of 1995, the parties jointly submitted proposed forms of judgment which were then entered by the Court of Appeals. (36a-52a). Thus, the money judgments entered by the Court of Appeals in *Durant I* in September of 1995, included the plaintiffs' claims for underfunding pertaining to only the *first* sentence of Const 1963, art 9, § 29, through the 1993-94 school year. *Durant v Mich (On Third Remand),* 213 Mich App 500; 541 NW2d 278 (1995). The record was not opened at that late point in the litigation to deal with the 33 plaintiffs' claims under the second sentence of § 29 of the Amendment.

As previously noted, this Court has concluded that in order for the doctrine of *res judicata* to be applicable "the issues must have been resolved in the first case." *Baraga County, supra,* 466 Mich at 269. None of the issues relating to the second sentence of § 29 of the Headlee Amendment were resolved in *Durant I, supra.* Therefore, it is submitted that *res judicata* has no application to the issues pled in the present complaint.

II. PLAINTIFF-TAXPAYERS IN THIS ACTION WHO WERE NOT PLAINTIFFS IN THE *DURANT I* PROCEEDINGS ARE NOT BARRED FROM BRINGING THIS ACTION BY OPERATION OF RELEASE OR WAIVER.

With respect to those plaintiffs in the present suit who were not also plaintiffs in the *Durant I* litigation, the Court of Appeals held that those taxpayers and the school districts whose interests they were pursuing had released or waived any right to seek to enforce a remedy pursuant to the second sentence of Const 1963, art 9, § 29. *Adair, supra,* 250 Mich App at 706-07. As will be discussed below, the Court of Appeals, in so holding, mistakenly failed to recognize the wholly prospective nature of plaintiff-taxpayers' request for declaratory relief. At issue are claims of

underfunding relating to the calendar year 2000 amendment to the School Aid Act. These are not claims, or potential claims, that the plaintiff-taxpayers had as of the September 30, 1997 operative date of the releases that were executed.

The form of the release/waiver required to be executed by the school districts that were not plaintiffs in *Durant I,* as a pre-condition to the receipt of the funds being offered to those school districts, was set forth in the 1997 amendment to the School Aid Act, 1997 PA 142, MCL 388.1611f(8). The pertinent portion of the resolution required to be adopted by each recipient board of education provided:

> The board waives any right or interest it may have in any claim or potential claim *through September 30, 1997*, relating to the amount of funding the district or intermediate district is, or may have been, entitled to receive under the State School Aid Act of 1979 . . . by reason of the application of section 29 of article IX of the state constitution of 1963, which claims are or were similar to the claims asserted by the plaintiffs in the consolidated cases known as *Durant v State of Michigan.* . . . MCL 388.1611f(8). (emphasis added)

In its April 23, 2002 decision, the Court of Appeals stated, in this regard:

> Plaintiffs concede that the government mandates that they allege are unfunded in violation of the POUM clause, with the exception of the record-keeping mandate . . . existed before September 30, 1997, *and, hence, that the alleged underfunding predates the execution of the releases.* (emphasis added) 250 Mich App at 708.

In fact, plaintiff-taxpayers conceded *no such thing*. The subject of the instant matter is state government's failure to meet its funding obligation under the second sentence of § 29 of the Headlee Amendment, as a result of 2000 PA 297, an appropriation act adopted in July of 2000. The entire thrust of the plaintiff-taxpayers' claim is focused, consistent with the second sentence of art 9, § 29, on the legislature's failure to provide the funding, through 2000 PA 297, required to defray the cost of certain specifically identified, newly required activities and services or post 1978 increased levels of activities and services. The plaintiff-taxpayers did not, in any sense, challenge the state's

right to impose the underlying mandates, but rather solely challenged the lack of required funding provided for those mandates under the 2000 Amendment to the School Aid Act, 2000 PA 297.

The School Aid Act, the legislative vehicle wherein all school appropriations occur, has historically been amended by the legislature for each successive school year. Amendments to the Act have been adopted annually since the School Aid Act was first enacted in 1979, MCL 388.1611 *et seq.* In the proceedings below, plaintiff-taxpayers sought a declaratory judgment that the 2000 Amendment to the Act, 2000 PA 297, which prescribed funding for the 2000-01, 2001-02 and 2002-03 school years, did not meet the funding obligation imposed on the state by the second sentence of § 29.

It is respectfully submitted that the Court of Appeals' decision, below, confuses the nature of plaintiff-taxpayers' claims. Those claims do *not* pertain to the fact that the identified activities and services continue to be required, but instead relate to the lack of current or on-going funding for these required activities and services, occasioned by the 2000 Amendment to the Act. The lack of funding provides the substance for a claim under § 29 of the Headlee Amendment, applying the plain meaning of the words used in that section of the Amendment. In the instance of school districts, that funding occurs annually through the adoption of amendments to the School Aid Act. Whether or not an activity or service was required as of September 30, 1997 is not the question raised in the present complaint. It is the State's on-going failure to fund these mandated activities and services at the constitutionally required levels which gives rise to the present cause of action.

In dismissing plaintiff-taxpayers' complaint on both *res judicata* and release/waiver grounds, the Court of Appeals failed to recognize the entirely *prospective* nature of the requested relief of declaratory judgment. It is submitted that it is illogical to suggest that litigation which resolved in 1997, *Durant v Michigan,* 456 Mich 175; 566 NW2d 272 (1997), and/or

releases/waivers executed in 1998, expressly waiving claims that existed through September 30, 1997, and that necessarily related to the different funding scheme contained in earlier amendments to the Act, could somehow serve to bar a challenge to later appropriation enactments, which provide funding for subsequent school years. Indeed, one has only to compare the operative funding sections of 1996 PA 300 (the 1996 amendment to the Act), germane to the Court's rulings in *Durant I*, and 2000 PA 297 (the 2000 amendment to the Act), germane to the present suit, to understand that wholesale changes were made in the funding mechanism for Michigan schools during that period.

The School Aid Act is not a static enactment in any sense, but changes substantively from year to year through amendments which affect not only the amounts of funding to be provided to school districts, but frequently create, out of whole cloth, funding subjects, funding amounts, and funding mechanisms that will apply in a particular year. The April 23, 2002 decision of the Court of Appeals would effectively place beyond any Headlee-based challenge such later school appropriation enactments, no matter how radically changed from an earlier appropriation act, so long as the constitutional violation relates to an activity or service imposed prior to July 1, 1997. Again, it is the failure to fund the activity or service in the year at issue, not when the requirement for that activity or service first arose, which gives rise to the cause of action under art 9, § 29.

It is axiomatic that the scope of a release is governed by the intention of the parties, as expressed in the release, considering all of the facts and circumstances. 66 *Am Jur 2d Release* § 31 (2001). A release covers only claims intended by the parties to be released and has no greater effect. Similarly, a waiver requires an intentional and voluntary relinquishment of a *known* right. *Roberts v Mecosta County General Hospital*, 466 Mich 57, 69; 642 NW2d 663(2002). No authority

is required to support the fundamental common law proposition that a release can only serve to absolve the party released through the time the release is executed.

The monetary recovery provided by the state for each of the plaintiff school districts in the *Durant I* proceedings was intended to reimburse those school districts for past underfunding and was based exclusively on the State's violation of its funding obligations under the first sentence of Const 1963, art 9, § 29. The legislation authorizing similar payments to all non-plaintiff school districts was intended to equalize the treatment of all school districts in the State (i.e., equalize as between *Durant I* participating school districts and non-participating school districts). It is inconsistent with the common law concept of release/waiver to hold that each of the approximately 450 non-plaintiff school districts is presumed to have known of, and also voluntarily waived, future claims of violations of the second sentence of Const 1963, art 9, § 29 during the course of resolving claims under the first sentence of that article and section. Again, this issue was never briefed nor argued in the *Durant I* proceedings and was not even mentioned in the report of Judge Mies, or the decisions of the Court of Appeals or this Court.

For these reasons, it is submitted that the school districts that did not participate in *Durant* I cannot be found to have knowingly waived or released these claims by virtue of the releases executed in 1998 by the school districts not participating in the *Durant I* litigation.

III. THE COURT OF APPEALS ERRED IN GRANTING SUMMARY DISPOSITION IN FAVOR OF THE STATE PURSUANT TO MCR 2.116(C)(10) WITH RESPECT TO PLAINTIFF-TAXPAYERS' CLAIM CONCERNING THE SINGLE RECORD STUDENT DATABASE REQUIREMENT. GENUINE ISSUES OF FACT EXIST AND PLAINTIFF-TAXPAYERS WERE DENIED AN OPPORTUNITY TO OFFER PROOFS IN SUPPORT OF THEIR CLAIM.

Plaintiff-taxpayers' second amended complaint included the following claim in Count III, paragraph 22:

K. By operation of MCL 388.1752, and Executive Order No. 2000-9, school districts are required to create and maintain data on essential student data elements, as determined by the Center for Educational Performance and Information and the Michigan Department of Education, on an on-going basis and in a format fixed by the Center and/or Department and to report same via internet transmission to the Michigan Department of Education for the purpose of the creation and maintenance of a Single Record Student Database (SRSD) as part of the Department's Michigan Education Information System (MEIS).

It was alleged that the newly required activity or service, referenced above, was established through the 2000 amendment to the School Aid Act and Executive Order No. 2000-9, both of which occurred in 2000, well subsequent to the *Durant I* proceedings which ended in 1997 and subsequent to the execution of the releases in 1998, discussed immediately above.

The Court of Appeals properly found that this particular aspect of plaintiffs' claim could not be controlled by its *res judicata* or release/waiver analyses, discussed above, because the mandate was imposed some three years after the close of the *Durant I* proceedings and more than two years after the releases were executed. Instead, however, the court determined, based on the pleadings alone, that the actions required in connection with the Single Record Student Database ("SRSD") did not constitute a "new activity," within the meaning of the second sentence of art 9, § 29. The court granted summary disposition in favor of the state on this issue, pursuant to MCR 2.116(C)(10).

In its discussion of this issue, the Court of Appeals first cited a pre-Headlee provision of the School Aid Act (MCL 388.1552) which required school districts to furnish to the Michigan Department of Education "those reports as the department considers necessary for the determination of the allotment of funds under this [School Aid] act." This statutory provision was repealed, post-Headlee, and recodified as MCL 388.1752, which currently provides:

> In order to receive funds under this act, each district and intermediate district shall also furnish to the Department of Education the information the department considers necessary for the administration of this act and for the provision of reports of educational progress to the senate and house committees responsible for education, the senate and house appropriations subcommittees responsible for appropriation to school districts, and the senate and house fiscal agencies, as appropriate.

The Court of Appeals held, without conducting an evidentiary hearing on what new or additional activities and services the SRSD entailed, that this section of the School Aid Act was, on its face, broad enough to encompass plaintiff-taxpayers' claim pertaining to this allegation of their complaint. The Court concluded, therefore, that this was not a new activity or service, and not an increased level of activity or service over that required in 1978, within the meaning of the second sentence of § 29.

Contrary to the court's conclusion, even if one considers that Michigan schools were under an obligation in November of 1978 to generate and maintain information on student records and to provide "reports as the department considers necessary for the allotment of funds under this [School Aid] act," MCL 388.1552, it cannot be reasonably disputed that the activities and services required by virtue of Executive Order 2000-9 represent "an increase in the level of . . . activity or service beyond that required by existing [i.e., December 1978] law . . . . " Const 1963, art 9, § 29 (second sentence). The plaintiffs' evidence will show that at the time the Headlee Amendment was adopted in 1978, the information required to be provided by Michigan school districts to the Michigan Department of Education relative to providing state aid and otherwise was rudimentary and wholly insignificant when considered in comparison with what is presently being required of those same school districts by virtue of Executive Order 2000-9 and that the additional costs in order to do so, accordingly, are significantly greater.

Plaintiff-taxpayers represent to this Court, and are prepared to prove, that the additional costs of complying with the SRSD requirements are very substantial. If given the opportunity, which, it is respectfully submitted, MCR 2.116(C)(10) requires, plaintiff-taxpayers are prepared to show the additional costs that are being incurred, including the expenses of purchasing software or adapting each school district's existing software (in some cases even acquiring new computers), data capture, data entry and on-going maintenance. For the Court's reference, plaintiff-taxpayers have included in Appellants' appendix, a document prepared by the Center for Educational Performance and Information which offers some indication of the enormity of this undertaking. (211a-228a). More comprehensive information concerning the Single Record Student Database is found at the Center for Educational Performance and Information website, http://www.michigan.gov/cepi.

The Court of Appeals had no basis for its conclusion that these additional requirements are insufficient to implicate the required funding under the second sentence of § 29. The court wholly failed to accord the plaintiff-taxpayers' allegations the deference required for the non-moving parties' allegations in the context of a motion for summary disposition under MCR 2.116(C)(7) and (10). *Shallal v Catholic Social Services,* 455 Mich 604, 609; 566 NW2d 571 (1997); *Skinner v Square D Co.*, 445 Mich 153, 162; 516 NW2d 475 (1994).

One further comment is required. The Court of Appeals closed this portion of the April 23, 2002 decision by stating:

> Further, the gathering of this data and its transfer to a central location for use in evaluating the efficiency and effectiveness of the educational delivery process and in developing improved methods of providing elementary and secondary education are administrative functions that constitute the essence of the state's constitutional obligation to "maintain and support a system of free public education and secondary schools . . . ." Const 1963, art 9, § 2. In effect, the executive order executes a constitutional

> mandate. Accordingly, the activities required by the order fall outside the ambit of the restrictions imposed by the Headlee Amendment. *Durant*, *supra*, 424 Mich at 387-388. 250 Mich App at 714.

It is submitted that this is a fundamental misreading of this Court's 1985 decision in *Durant v State Board of Education*, 424 Mich 364, 381 NW2d 662 (1985). Among the issues addressed by this Court in *Durant* was the plaintiffs' contention that article 9, § 29 should be read expansively, so as to include any and all activities and services provided by school districts necessary to provide a free public education, within the meaning of Const 1963, art 8, § 2. This Court said, in that context, that an activity or service implicating a Headlee funding obligation must find its source in a state statute or state administrative rule to be actionable. *Id.* at 387. That is, it is insufficient for a taxpayer to simply base a claim of underfunding on activities and services that are, generally speaking, required by the Constitution.

The Court of Appeals' conclusion in this case that a statutory provision, which generally relates to the Constitution, is not covered by art 9, § 29 finds no support in *Durant I*, and would immediately render the Headlee Amendment funding obligation a nullity in regard to activities and services required of local school districts. All statutory provisions applying to schools in Michigan find their genesis in the Michigan Constitution, specifically Const 1963, art 8, §§ 1 and 2. Indeed, the entire provisions of the Revised School Code, MCL 380.1 *et seq.*, represent the legislature's attempt to implement Article 8, §§ 1 and 2 of the Constitution. By the court's logic, that fact would thereby render taxpayers' claims for underfunding for activities and services mandated through that Code non-actionable: a logic which is directly belied by the very fact that this Court found as a principal point of decision in its 1985 decision in *Durant I*, that so-called categorical services, including special education services, mandated through the then School Code of 1976, fell squarely under the funding requirements of § 29 of the Headlee Amendment. *Id.* at 391-92

Accordingly, there is no basis for the Court of Appeals' holding, in this regard. It would, moreover, if adopted, serve to totally emasculate taxpayers' remedies under § 32 of the Headlee Amendment concerning funding for Michigan schools.

CONCLUSION

In the final analysis, the present decision of the Court of Appeals, if not reversed, stands for the proposition that Michigan taxpayers will have no remedy for state government's possible violations of the funding requirements of § 29 of the Headlee Amendment through amendments to the School Aid Act adopted in the future. This state of affairs will apply into the indefinite future, according to this decision, because of the fact that the *Durant I* case came to an adjudicated conclusion, thereby invoking the application of *res judicata* as to claims under both the first and second sentences of § 29, Const 1963, art 9, § 29, for all school districts participating in *Durant I* and because the balance of school districts in Michigan signed a general release in 1998 for past underfunding, thereby forever waiving claims of future violations of § 29 of the Amendment. As an added emphasis on the preclusion of future claims, the court held in its final point of decision that even though requirements may have been imposed on school districts by operation of later executive orders, that manifestly impose additional costs on those local units of government, taxpayer claims are foreclosed so long as it can be said that the requirement is derived from Const 1963, art 8, §§ 1 and 2, which provide:

> Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. Article 8, § 1.
>
> The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. . . . Article 8, § 2.

In short, according to the Court of Appeals, the events of 1997 and 1998 have forever foreclosed future resort to the remedy afforded by § 32 of the Headlee Amendment.

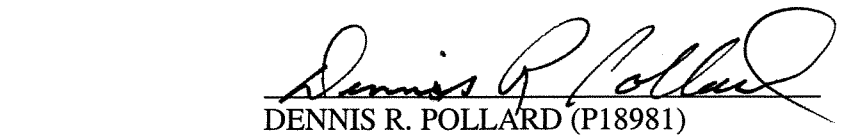
It is respectfully submitted that the present decision of the Court of Appeals, if not reversed, will, most certainly, frustrate the reform which the Michigan electorate intended to permanently impose on *their* government through the adoption of the Headlee Amendment. For the reasons above presented, the plaintiff-taxpayers' request that the Court reverse the court's decision below on the three issues of law under review.

RELIEF REQUESTED

Plaintiff-taxpayers respectfully request that this court reverse the decision of the Court of Appeals on the three issues on appeal and remand this case to the Court of Appeals for trial or other disposition on the issues raised in plaintiff-taxpayers' second amended complaint.

Respectfully submitted,

POLLARD, ALBERTSON, NYOVICH & HIGDON, P.C.



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